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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 778

JOHN JOSEPH KAN, *Petitioner,*

vs.

ERNEST TSANG, *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI,
to the United States Court of Appeals
for the Ninth Circuit,
and
BRIEF IN SUPPORT THEREOF.**

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**PETITION FOR A WRIT OF CERTIORARI,
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for the Ninth Circuit.**

To the Honorable Fred N. Vinson, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

John Joseph Kan, hereinafter called "Petitioner", respectfully prays that a writ of *certiorari* issue to review a decision of the United States Court of Appeals for the Ninth Circuit, rendered on February 11,

1949 (R. 259). The case was brought to the United States Court of Appeals for the Ninth Circuit under the provisions of Section 8 of the Selective Training and Service Act of 1940, as amended (50 U.S.C.A. App. 308) and, Section 7, of the Service Extension Act of 1940, as amended (50 U.S.C.A. App. 357).*

OPINION BELOW.

The judgment and opinion of the District Court is reported in 74 F. Supp. 508. The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 173 F. (2d) 204. Both opinions are attached hereto as Appendices "A" and "B", and are contained in the record at pages 15 and 260, respectively.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) Judicial Code, as amended, 28 U.S.C.A. (1). Petitioner also relies on Rule 38, Paragraph 5 (a), (b) of this Court for his grounds upon which this petition is made.

STATUTES.

The statutes involved are the following:

1. Selective Training and Service Act of 1940, as amended, 50 U.S.C.A. App. 308.

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*Appendix C.

2. Service Extension Act of 1940, as amended, 50 U.S.C.A. App. 357.

Pertinent sections are set out in Appendix "B".

STATEMENT OF THE MATTER INVOLVED IN PETITION.

This case arose out of a petition brought in the United States District Court under Section 8 of the Selective Training and Service Act of 1940, as amended. (R. 2.) The petitioner originally sought employment reinstatement together with compensation for loss of wages and benefits resulting from respondent's alleged refusal to reinstate him but, in the course of the trial, waived reinstatement to his position and sought only a money judgment for the loss of wages. (R. 71-73.)

The respondents defended on two grounds, first, that the issues had already been decided adversely to petitioner in certain proceedings in the Superior Court of the State of California, and second, that respondents offered to reemploy the petitioner at the salary he was receiving when he entered the armed forces but that petitioner refused to accept the offer unless it would include a three-year contract of employment. (R. 5-11.)

The petitioner denied that he had been offered his job back and also claimed that he was entitled to certain increases in pay which had been given to an employee in a similar position while he was in the service. (R. 70-71.)

The factual situation out of which the case arose is succinctly stated in the opinion of the District Court as follows (R. 51-19 and Appendix B):

"The Record discloses that the petitioner Kan was not only one of the founders of the Cathay House, a restaurant in San Francisco, but its active head and the man whose energy and ability were largely responsible for its phenomenal success. After its founding Tsang bought shares of stock in the business and he and the petitioner became the President and Secretary, respectively, of the corporation. They were co-managers, each receiving the same salary. When Kan received a salary increase, Tsang likewise received an increase. When Kan enlisted in the armed forces on July 23, 1943, he and respondent Tsang were receiving $500.00 a month. At that time, Tsang, by additional purchases of shares of stock, had gained a controlling interest in Cathay House.

"While Petitioner was in the service the corporation was changed to a partnership, Tsang becoming a general partner and petitioner a limited partner, along with others. This change was agreed to by petitioner's wife, who was also employed at Cathay House and to whom petitioner had given power of attorney, but the evidence is conflicting as to whether she and her counsel endeavored to have the change delayed until the petitioner came home on leave. In any event, the change was one of form only. The interested parties remained the same and the restaurant business was conducted as before.

"The petitioner was honorably discharged from the service on November 26, 1943, and shortly thereafter asked respondent Tsang to reemploy him. Tsang was then earning $750.00 per month.

"From this point on the record contains much conflicting testimony but it does clearly appear that at no time during the negotiations that followed petitioner's request for reemployment was the petitioner offered the position of co-manager with the same salary as Tsang then was receiving. The most that was offered was his old salary of $500.00 per month and there is persuasive evidence that even that offer was conditioned on Kan's signing what the parties denominated a 'waiver' or 'release'. The situation culminated in Tsang's filing an action for declaratory relief in the state court, in which Kan filed an answer and cross-complaint. Judgment was given in favor of Tsang. Kan and three others subsequently filed a suit for an accounting and dissolution of the partnership. The partnership was dissolved and the property sold, Tsang being the purchaser."

The District Court held that under the Act the petitioner was entitled to be restored to the position of co-manager and to receive the same salary as Tsang, the other co-manager, was receiving and that an offer of anything less was not a compliance with the Act provisions, nor was an offer conditioned on the veteran's waiving or releasing any of his rights guaranteed by the Act.

The District Court, following the decision of the Court of Appeals of the Sixth Circuit in *Trailmobile*

Co. v. Whirls, 154 F. (2d) 866, refused to be bound by the decision of the Superior Court and the District Court of Appeal of the State of California in *Tsang v. Kan*, 78 C.A. (2d) 275, holding, and quoting from the *Trailmobile* decision, "The interpretation by the state court of the rights of a citizen under a federal statute is not binding on the federal courts". (R. 17-18 and Appendix B.)

QUESTIONS PRESENTED.

1. Do the United States Courts have exclusive jurisdiction over cases arising under the Statutes in question?

2. Is the decision of a state court, interpreting the Statutes in question and determining the rights of a veteran under them, binding on a United States Court?

REASONS FOR GRANTING WRIT.

1. Conflict of Decision Between Circuits.

The Sixth Circuit, in *Trailmobile Co. v. Whirls*, 154 F. (2d) 866, in a similar case, denied that the appellee's rights had been adjudicated against him by the Ohio state courts, holding that the subject matter before it did not pertain to general common law but that a decision thereof was governed by an Act of Congress. The Court said: "The interpretation by the state court of the rights of a citizen under a federal statute is not binding upon the federal courts." On the other hand, the Court of Appeals for

the Ninth Circuit, in the instant case, holds that the state and federal courts have concurrent or coordinate jurisdiction of cases arising under the Act, and that an adjudication against the veteran by the state court is binding upon the federal court.

2. The Decision of the State Court, Interpreting the Act Which Is in Conflict with the Decisions of Several Federal Courts, Presents a Problem Which Should Be Resolved by This Court.

The United States Court of Appeals (R. 259 and Appendix A) held that the decision of the Superior Court of the State of California, affirmed by the District Court of Appeal of that State, was binding upon the District Court and ordered that the appellee's (petitioner's) complaint (petition) be dismissed.

The said Superior Court found (Appendix D) that within three months following the date of discharge plaintiff Tsang and said partnership offered to immediately restore defendant to the same position which he had with the corporation but defendant refused to accept the same.

The State Court thus interpreted the Act to mean that an offer to reemploy the veteran in the same position as he had when he entered the service amounted to compliance with the provisions of the Act. This interpretation is in direct opposition to the interpretation given to this portion of the Act by federal courts, in the following cases:

Salter v. Becker Roofing Co., 65 F. Supp. 633;
Parker v. Boyce, 74 F. Supp. 581;

Covey v. Douglas Aircraft Co., S.D. Cal., as yet unreported;

Troy v. Mohawk Shop, Inc., 67 F. Supp. 721;

Tannenbaum v. Ballentine Sons, 161 F. (2d) 1023, affirming an, as yet, unreported decision of the District Court of New Jersey;

Mihelich v. Woolworth Co., 69 F. Supp. 497.

Wherefore, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
May 6, 1949.

Respectfully submitted,
GILBERT S. WOOLWORTH,
Attorney for Petitioner.

JAMES T. DAVIS,
Of Counsel.

(Appendices Follow.)

Appendix A

In the United States Court of Appeals for the Ninth Circuit

Ernest Tsang, Appellant, vs. John Joseph Kan, Appellee.	No. 11,891 Feb. 11, 1949

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Before: Denman, Chief Judge, Stephens, Circuit Judge, and Bowen, District Judge.

Denman, Chief Judge:

This is an appeal from a judgment for the appellee, a returned veteran, for lost wages due to the failure of appellant to restore him to his employment prior to his war service, he having waived restoration to his former position. The identical issues had been adjudicated against appellee in a suit between the parties in the Superior Court of the State of California in and for the City and County of San Francisco. There the employer, appellant, sought a judgment declaring his obligation to appellee veteran, and he, instead of seeking a dismissal on the ground that the G. I. Bill of Rights gave him the right to choose his own forum, cross complained and sought affirma-

tively from the state tribunal a judgment for his wages.

The district court held that the veterans' bill gives no jurisdiction to the state courts to adjudicate any of the rights conferred on the veteran. The appellant assigns as error this holding.

Congress in the G. I. Bill of Rights, Sec. 308 (b) (B), gives the returned veteran the right of restoration to a position he had occupied and to wages as follows:

> "if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so".

It also gives him a second right, in Sec. 308 (e). That is the right to sue in the United States district court for an amount less than $3,000, free of costs and with the United States Attorney as his counsel. The question is, Does this second right so to sue in the United States district court deprive him of the right to sue in the state courts?

The mere giving of such jurisdiction to the federal courts does not thereby exclude that of the state courts. This was clearly established in Claflin v. Housman, 93 U.S. 130, where the bankruptcy act, Rev. Stats. 5047, gave the assignee, in his own name, the power to recover all the debts due the bankrupt, and under Sec. 4972 the United States district court was given jurisdiction:

> "First. To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy.
>
> "Second. To the collection of all the assets of the bankrupt."

The question there was whether the conferring of jurisdiction on the federal courts to entertain such suits by the assignee confined him to that jurisdiction. The Supreme Court held that, although an act of Congress conferred jurisdiction in such suits on the federal courts, the state courts had jurisdiction to entertain them unless, in addition to conferring jurisdiction on the federal courts, the act also excluded that of the state courts. The principle is stated at page 135

> "* * * where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself; but, if exclusive jurisdiction be neither *express nor implied,* the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it." (Emphasis supplied.)

Cf. Galveston etc. Ry. v. Wallace, 223 U.S. 481, 490; Healy v. Ratta, 292 U.S. 263, 271; Western Fruit Growers v. U. S., 124 Fed. (2d) 381, 387 (9 Cir.).

Since the G. I. bill does not expressly deprive the veteran of suing in the state courts to recover under the rights conferred by 308 (b) (B), the question becomes, Does the act deprive him of that right by implication?

The Supreme Court has held that the rights created by this act shall be liberally construed in favor of the veteran, *Fishgold v. Sullivan Dry Dock Co.*, 328 U.S. 275, stating at page 285:

> "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. * * * Our problem is to construe the *separate provisions* of the Act as parts of an organic whole and *give each as liberal a construction for the benefit of the veteran* as a harmonious interplay of the separate provisions permit." (Emphasis supplied.)

Though generally the jurisdiction of the federal courts is to be strictly construed, Healy v. Ratta, 292 U.S. 263, 273, the second circuit, in determining the extent of its jurisdiction under the G. I. Bill of Rights, applies the liberal construction of the Fishgold case. Feore v. North Shore Bus Co., 161 Fed. (2d) 552, 553 (Cir 2).

It is apparent that a liberal construction permitting suits by the veteran in the state courts to recover under the right created in him would strongly favor him in many cases. For instance, a logger in Del Norte County, on the northern border of California, refused restoration by a lumber company there, well could be in a better position to sue in the Del Norte County court. He would be saved the costly trip of nearly four hundred miles to San Francisco, first, to consult with the United States Attorney under Sec. 308 (f) regarding a suit in the United States

district court there, and if the United States Attorney so advises, then, second, all the costs of travel and hotel bills and loss of time of himself and witnesses to be brought to San Francisco for the trial. Similarly of a veteran miner refused restoration by a mining company in Inyo County, on California's eastern border, or a ditchtender in the Imperial Valley on the state's southern border. Such expense to present the veteran's case in a district court well may deprive him of any relief.

Here is as liberal a construction for the benefit of the veteran as the "harmonious interplay of the separate provisions permits," Fishgold case, supra. He may sue in the nearby state court for the right created in him if it be the more advantageous method, or he may seek the distant federal court with its benefits, if, in the balancing of expenditures, the latter costs the veteran less. As the Supreme Court states concerning the contention that a foreign diplomat may sue only in the Supreme Court because the Constitution gives him that jurisdiction, "to deprive an ambassador, public minister or consul of the privilege of suing in any court he chose having jurisdiction of the parties and the subject matter of his action, *would be, in many cases to convert what was intended as a favor into a burden.*" (Emphasis supplied.) Ames v. Kansas, 111 U.S. 449, 464. See also id. page 468.

In addition to California, the following state courts have exercised jurisdiction in cases brought by the veteran. Newman v. McCullough, 212 S.C. 17, 46 S.E.

2d 252; Murphy v. Chrysler Corp., 306 Mich. 610, 11 N.W. 2d 261; Hanebuth v. Patton, 115 Colo. 166, 170 P. 2d 526; In re Walker's Estate, 185 Wisc. 1046, 63 N.Y.S. 2d 106. There probably are many more such state court cases terminating in the trial courts and unreported.

It is not without significance that 28 U.S.C., as amended, classified the jurisdiction for the litigation of certain federal legislation as exclusive. § 1333, Admiralty, maritime and prize cases; § 1334, Bankruptcy matters and proceedings; § 1338, Patents, copyrights, trade marks; § 1346, United States as defendant in suits arising under the Federal Tort Claims Act; § 1355, Fine, penalty or forfeiture; § 1356, Seizures not within admiralty and maritime jurisdiction. The G. I. Bill of Rights is not so classified.

The case is clearly distinguishable from the decisions on the Sherman Anti Trust and Clayton Acts. These acts make punishable as misdemeanors certain acts in restraint of interstate trade. No provision creates any general right in any private person, as Sec. 308 (b) (B) of the Bill of Rights creates in a separate section the right of restoration to employment and for wages. These anti trust acts certainly have not been held construable liberally in favor of the private litigant. The sole right they create in any person other than the government is the right to sue in the United States district courts. See Genl. Inv. Co. v. Lake Shore Ry., 260 U.S. 261, where, at page 287, the opinion states, of the sole right in a private liti-

gant: "The right to sue, however, is granted in terms which show that it is to be exercised only in a 'Court of the United States.' "

Knox Loan Assn. v. Phillips, 300 U.S. 194, clearly shows another type of statute which necessarily by implication excludes the state jurisdiction. The question was whether the state court could wind up the business of the federally created National Farm Association. Of this, the Supreme Court stated "that a national farm loan association is an instrumentality of the federal government; that the time and manner of liquidation are governed by the federal statute; and that jurisdiction does not reside in the tribunals of a state to wind up the business of this governmental agency either by receivership or otherwise." This legislation is entirely different from the instant statute conferring rights on a private person and which is to be liberally construed in his favor.

The judgment is reversed and the district court ordered to dismiss appellee's complaint.

Stephens, Circuit Judge, concurring in the result:

I concur in the result only, and in doing so I wish to note that I am not at all certain but that Congress intended to confine jurisdiction of litigation under the Act commonly called the "G. I. Bill of Rights" to the federal courts. It provided that the United States District Attorney should serve the "G. I." without cost and in this it seems quite improbable to me that Congress had in mind directing United States Attorneys to act in state court actions, bound

to be extensive in numbers. The Act provides that the courts' services shall be free of costs to the returning service man and that actions under it shall be given a speedy hearing and shall receive preference on the court's calendar. Here, surely the Congress was thinking of federal courts for it could hardly assume to command the states in the matters of costs and in the handling of calendars in their courts. It may be argued that the "G. I." can select his forum and if he selects the state over the federal forum he knowingly waives the privileges granted him in the Act. Even if this be granted, it does not conclusively destroy the seeming intent of Congress that it was legislating with the view that litigation under its legislation would be in federal courts.

It is not clear to me, however, that the way is always open to the service man to select his forum if both state and federal courts have jurisdiction of his case. May the employer not do as he did in the instant case and draw the returning employee into the state court, "willy-nilly", by fast action in filing a declaratory action? If so, the congressional intent to grant special advantages to those who fought for the government may be defeated.

As against these doubts I am aware of the broad general principle that state courts have concurrent or coordinate jurisdiction in federal matters unless Congress indicates otherwise in its legislation, either by direct provision or in a manner clearly inconsistent with it. I, also take note of the fact that state courts

have taken jurisdiction of these matters in numerous instance.

By so narrow a margin that abiding doubt remains, my decision falls in agreement with that reached by my associates.

(Endorsed:) Opinion and Concurring Opinion. Filed Feb. 11, 1949. As amended by order of March 25, 1949. Paul P. O'Brien, Clerk.

Appendix B

In the Southern Division of the United States District Court for the Northern District of California

John Kan, Petitioner, vs. Ernest Tsang, et al., Respondent.	No. 25,864-R

Action for reinstatement and compensation pursuant to the provisions of Section 8 of the Selective Training and Service Act of 1940, as amended. Judgment for petitioner, in accordance with opinion.

Frank J. Hennessy, United States Attorney, and R. J. Scholz and Joseph Karesh, Assistant United States Attorneys, of San Francisco, California, attorneys for petitioner.

Robert E. Hatch of San Francisco, California, attorney for respondent Ernest Tsang.

Memorandum Opinion

Roche, District Judge: This is an action brought under Section 8 of the Selective Training and Service Act of 1940, as amended. The petitioner originally sought employment reinstatement together with compensation for loss of wages and benefits resulting from respondents' alleged refusal to reinstate him, but he now asks only a money judgment for such

compensation, waiving other rights that he may have under the Act.

Respondents defend on two grounds: First, that the issues herein have already been decided adversely to petitioner in certain proceedings in the superior court of the State of California, and second, that respondents offered to re-employ the petitioner at the salary he was receiving when he entered the armed forces but that petitioner refused to accept the offer unless it would include a three year contract of employment.

The record discloses that the petitioner Kan was not only one of the founders of the Cathay House, a restaurant in San Francisco, but its active head and the man whose energy and ability were largely responsible for its phenominal success. After its founding Tsang bought shares of stock in the business and he and the petitioner became the President and Secretary, respectively, of the corporation. They were co-managers, each receiving the same salary. When Kan received a salary increase, Tsang likewise received an increase. When Kan enlisted in the armed forces on July 23, 1943, he and respondent Tsang were both making $500 a month. At that time, Tsang, by additional purchases of shares of stock, had gained a controlling interest in Cathay House.

While Petitioner was in the service, the corporation was changed to a partnership, Tsang becoming a general partner and petitioner a limited partner, along with others. This change was agreed to by peti-

tioner's wife, who was also employed at Cathay House and to whom petitioner had given power of attorney. but the evidence is conflicting as to whether she and her counsel endeavored to have the change delayed until the petitioner came home on leave. In any event, the change was one of form only. The interested parties remained the same and the restaurant business was conducted as before. Such a reorganization was ineffective to cut off the petitioner's rights under the Selective Service Act.

The petitioner was honorably discharged from the service on November 26, 1943, and shortly thereafter asked respondent Tsang to reemploy him. Tsang was then earning $750 per month.

From this point on the record contains much conflicting testimony but it does clearly appear that at no time during the negotiations that followed petitioner's request for reemployment was the petitioner offered the position of co-manager with the same salary as Tsang was then receiving. The most that was offered was his old salary of $500 a month and there is persuasive evidence that even that offer was conditioned on Kan's signing what the parties denominated a "waiver" or "release." The situation culminated in Tsang's filing an action for declaratory relief in the state court, in which Kan filed an answer and cross-complaint. Judgment was given in favor of Tsang. Kan and three others subsequently filed a suit for an accounting and dissolution of the partnership. The partnership was dissolved and the property sold, Tsang being the purchaser.

Respondents' defense of res judicata is based on the foregoing state court proceedings. It is true that the state court made a finding that respondent Tsang and the partnership had offered to restore Kan to the same position which he had held with the Cathay House corporation, but even assuming that such an offer met the Act's requirements, this finding cannot bind a federal court. The same defense of res judicata, based on a declaratory judgment rendered by the Ohio state court, was raised by the respondents in the case of Trailmobile Co. v. Whirls, 154 F. 2d 866, an action by a veteran for restoration to his seniority status as it existed prior to his entry into military service. The Sixth Circuit Court of Appeals disposed of the defense in the following language: "The interpretation by the state court of the rights of a citizen under a federal statute is not binding upon the federal courts." The question for decision is thus one of fact—did any offer of reemployment made by respondents to petitioner comply with the terms of the Act.

So far as pertinent, the Act provides that if a position, other than a temporary position, was in the employ of a private employer, the person so employed shall be restored to such a position unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. It is further provided that such restoration shall be without loss of seniority. The courts have been very liberal in construing these provisions, having in mind the purpose of the statute. They are more than patriotic promises.

Rather, they are a guarantee to the honorably discharged veteran that, upon application timely made, he will be restored to his former position or to one of like seniority, status and pay and that he will lose no seniority in the process. If during the veteran's service in the armed forces, the person filling his position receives a higher salary, an offer to reemploy the veteran at his old salary is not a compliance with the Act. The veteran must be given the benefit of any wage increases that have been made during his absence. Salter v. Becker Roofing Co., 65 F. Supp. 633. To the same effect are the decisions of the United States District Court for the Southern District of California in Parker v. Boyce and Covey v. Douglas Aircraft Co.

In the instant case, when the petitioner enlisted in the army he was co-manager with the respondent Tsang of the Cathay House and received the same salary. Upon his honorable discharge and application for reemployment, he was entitled to be restored to the position of co-manager and to receive the same salary that Tsang, the other co-manager, was receiving. An offer of anything less was not a compliance with the Act's provisions, nor was an offer conditioned on the veteran's waiving or releasing any of his rights guaranteed by the Act. Since the evidence conclusively shows that respondents failed to offer to restore the petitioner to his position as co-manager at the increased salary which respondent Tsang was then being paid, it follows that judgment must be entered in favor of the petitioner.

Petitioner having waived his claim for reinstatement and for all back pay, except for a twelve month period, it is

Ordered that there be entered herein, upon finding of fact and conclusions of law, judgment in favor of the petitioner in the sum of $7,481.28, that being 12 months back pay at $750.00 a month less $1,518.72 earned by him from December 4, 1943, the date of his application for reinstatement, to December 4, 1944, and that respondents shall bear the costs.

Dated, November 13, 1947.

Michael J. Roche,
United States District Judge.

(Endorsed) Filed Nov. 13, 1947.

Appendix C

The pertinent portion of Section 8 of the Selective Training and Service Act of 1940, as amended (50 U.S.C.A. App. 308) reads as follows:

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year.

* * * * * * *

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of

absence in effect with the employer at the times such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against the person so applying for such benefits."

The pertinent portion of Section 7 of the Service Extension Act of 1940, as amended (50 U.S.C.A. App. 357), reads as follows:

> "(a) Any person who subsequent to May 1, 1940, and prior to the termination of the authority conferred by Section 2 of this joint resolution, shall have entered upon active military or naval service in the land or naval forces of the United States shall be entitled to all the reemployment benefits of Section 8 of the Selective Training and Service Act of 1940, as amended, to the same extent as in the case of persons inducted under the Act."

Section 2 of the Service Extension Act of 1940, as amended, above referred to, reads as follows:

> "The President is hereby authorized, subject, however, to the condition hereinafter stated, to extend for such periods of time as may be necessary in the interests of national defense, the periods of service, training and service, enlistment, appointment, or commission, of any or all persons inducted for training and service under the said Act members and units of the reserve components of the Army of the United States (including the National Guard of the United States), retired personnel and enlisted men of the Regular Army, and any other members of the Army, who are now, or who may hereafter be, in or subject to active military service, or training and service: *Provided,* That extension of the periods of active military service, or training and service, in the case of any person subject to the provisions of this section, shall not, without

this consent, exceed eighteen months in the aggregate; except that whenever the Congress declares that it is in the interests of national defense to further extend such periods of active military service and training and service, such periods may be further extended by the President, in the case of any such persons, for such time as may be necessary in the interests of national defense: *Provided further,* That the authority hereby conferred is subject to the condition that the delegation of such authority may be revoked at any time by concurrent resolution of the Congress." Aug. 18, 1941, c. 362 § 2, 55 Stat. 626; 50 U.S.C. App. 352.

Appendix D

Superior Court of the State of California
City and County of San Francisco

No. 333586 Dept. No. 13

Ernest Tsang,
Plaintiff,
vs.
John Kan,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This case came regularly on for trial in the above entitled court, Hon. Frank T. Deasy, Judge, presiding without a jury, a jury having been waived, on May 7, 1945, plaintiff appearing in person and by his attorney Robert E. Hatch and defendant appearing in person and by his attorneys Alden Ames and Sidney A. Romer. Issues were joined upon plaintiff's complaint for declaratory relief, defendant's answer thereto, defendant's cross-complaint and plaintiff's answer thereto. Evidence having been offered and received, the matter being submitted for decision, the court being fully advised and good cause therefor, hereby makes its

FINDINGS OF FACT

I.

Cathay House, Inc., was incorporated under the laws of the State of California on or about September

28, 1939. Ever since October 1, 1943, plaintiff continuously has been and now is the president and general manager of said corporation.

II.

A limited partnership by the name of the Cathay House was organized and created in accordance with the laws of the State of California, on or about October 1, 1943 with Ernest Tsang as general partner and the following named as limited partners in the fraction of interest which is set forth immediately after his or her name, to wit: L. M. Carter 100/9700, George Chew 1500/9700, George Chin 200/9700, Philip Fong 1000/9700, Helen Kan 100/9700, John Kan 1000/9700, Fred Leong 400/9700, Ernest Tsang 5300/9700 and Paul Yuke 100/9700. That ever since to and including the present time the partnership has consisted of the said partners in the same fractions of interest except that the interest of George Chew has been assigned to Frank Bing Wong.

III.

On or about said last mentioned date said corporation duly sold, assigned and transferred to said partnership all of its right, title and interest in and to the assets of said corporation, restaurant business, furniture, furnishings, equipment, supplies and good will conducted at 718 California Street in the City and County of San Francisco, aforesaid, under the name of the Cathay House. Ever since said partnership continuously has been and now is the owner thereof.

IV.

At all times during the existence of said partnership, to and including the present time, defendant continuously has been and now is a limited partner therein with the partnership interest of 1000/9700ths.

V.

In addition thereto defendant has asserted and made other claims against plaintiff and said partnership, but at the time of the commencement of this action on October 21, 1944 and ever since said claims and assertions have been without right and contrary to fact.

VI.

On or about July 23, 1943 defendant voluntarily terminated his relationship with said corporation except as a stockholder thereof. Other than as a stockholder of said corporation and as a limited partner in said partnership, defendant has had no connection therewith and has not been, nor is he now, officer, director or employee thereof. Defendant never has been and is not now an employee of plaintiff or of said partnership.

VII.

During the time that defendant was an officer and when he was an employee of said corporation his term of office and employment were at the pleasure of the Board of Directors of said corporation, and not otherwise.

VIII.

Other than as hereinabove specifically mentioned, there never has been nor is there now any contract, agreement or understanding by or on behalf of defendant, on the one part, and said corporation, partnership or plaintiff, or either or all of them, in reference to said business or property, particularly including his employment or compensation or rights to participate in said business, the profits therefrom or the good will thereof.

IX.

At the time of the formation of said partnership defendant freely and voluntarily consented to and did become a member thereof and freely and voluntarily did consent to the said transfer from said corporation to said partnership. In doing so defendant acted independently, upon the advice of his own attorney, without reposing any confidence or trust in plaintiff and without plaintiff accepting any trust toward defendant.

X.

All of the allegations contained in the said complaint for declaratory relief were and are true and correct.

XI.

It is true that defendant was one of the promoters of said corporation, but plaintiff became financially interested therein almost immediately upon its organ-

ization. At all times during its existence said corporation has been operated by its board of directors, and not otherwise.

XII.

Immediately preceding when defendant entered the service of the United States Army on or about July 23, 1943, defendant was employed by said corporation at $500.00 per month, the term and amount being at the discretion of the board of directors of said corporation, and with no agreement, oral or written, for the continuation of defendant's employment or defendant's receiving a different rate of compensation in the future.

XIII.

Defendant was discharged from the United States Army on or about November 26, 1943 and never since has been nor is he now a member of the military service of the United States.

XIV.

Within three months following said last mentioned date plaintiff and said partnership offered to immediately restore defendant to the same position which he had with the corporation as next above stated, but defendant refused to accept the same.

XV.

At no time since his said discharge from the army to and including May 7, 1945, has defendant applied

to, offered or requested said corporation, partnership or plaintiff to employ him in a position of like seniority, status, or pay to that which he had with said corporation at the time of his entering said army.

XVI.

Defendant has suffered no damages by reason of the premises, or otherwise.

XVII.

It is not true that plaintiff has wilfully and/or fraudulently deprived defendant of any employment and/or active interest in said business with the deliberate or any intent of seizing said business for plaintiff's benefit and/or to the exclusion of defendant, or otherwise; that at any time said plaintiff has made any promises to take defendant back into the business at any time.

XVIII.

It is not true that plaintiff compelled Helen Kan, the wife of defendant, by duress and/or threats of injury to the interest of her husband, or otherwise, to sign her said husband's name to a certificate of limited partnership, but on the contrary said Helen Kan acted in said matter deliberately and freely, with the full knowledge and consent of defendant and upon the advice and concurrence of their attorney.

XIX.

It is not true that plaintiff knew that a limited partner could not be employed in the partnership business and/or that plaintiff had no intention of permitting defendant to participate therein as a limited partner, general partner, or otherwise.

XX.

It is not true that plaintiff has been guilty of any fraud or fraudulent acts or that by plaintiff defendant has been deprived of his employment and former position or that defendant cannot obtain similar employment elsewhere.

XXI.

It is not true that defendant has suffered any damage whatsoever, either by the acts done, permitted or suffered by plaintiff, or otherwise.

XXII.

By reason of the actions and conduct of defendant prior to the commencement of this action, said corporation, partnership and plaintiff have good and sufficient reason to believe that defendant is not a suitable person to be employed by them or that he could be employed by them without irreparable damage ensuing to them.

From the foreging Findings of Fact, the court makes its

Conclusions of Law

I.

Plaintiff is entitled to a decree in declaratory relief adjudicating and determining that defendant is a limited partner in the Cathay House, a partnership, to the extent of 1,000/9700ths with all of the rights, privileges and obligations usually attendant upon such ownership; that other than that there are no rights or obligations of any kind and character with respect to said corporation, partnership and plaintiff on the one hand and defendant on the other hand.

II.

Defendant has no right to be employed by said corporation, partnership or plaintiff, and said corporation, partnership and plaintiff are not obligated to employ defendant in any manner whatsoever.

III.

Cross-defendant is entitled to judgment on the cross-complaint and that cross-plaintiff take nothing.

IV.

Plaintiff and cross-defendant is entitled to his costs of suit herein.

Let a judgment and decree be entered accordingly.

Done in open court on December 10, 1945.

Frank T. Deasy, Judge.

The annexed instrument is a correct copy of the original on file in my office. Attest: Certified May 5, 1949. Martin Mongan, County Clerk of San Francisco, and ex-officio clerk of the Superior Court of the State of California, in and for the County of San Francisco. By J. L. Perusio, Deputy.

Filed December 10, 1945.
H. A. van der Zee, Clerk.
By A. J. Malone,
Deputy Clerk.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No.

ERNEST TSANG, *Petitioner,*

vs.

JOHN JOSEPH KAN, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

PRELIMINARY STATEMENT.

Reference is hereby made to the foregoing petition for the opinions below, grounds of jurisdiction, statutes involved, statement of the case, questions presented and reasons for granting the writ.

SPECIFICATIONS OF ERROR.

Petitioner submits that the Court of Appeals erred in the following particulars:

1. In holding that Congress did not intend that jurisdiction under the Act should be exclusive to the United States Courts.

2. In holding that the decision of a State Court, interpreting an Act of Congress, is binding upon a United States Court.

ARGUMENT.

I.

CONGRESS INTENDED THAT JURISDICTION OVER THE STATUTE INVOLVED HERE, SHOULD BE EXCLUSIVE TO THE FEDERAL COURTS.

1. The Statute,* in subsection (e), provides, in part:

> "In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States * * * shall have power * * * to specifically require such employer to comply with such provisions * * * The court shall order a speedy hearing in any such case and shall advance it on the calendar upon application to the United States district attorney or comparable official * * * such United States District Attorney or official * * * shall appear and act as attorney for such person on the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof * * * Provided, that no fees or court costs shall be taxed against the person so applying for such benefits."

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*Appendix A.

It may be accepted as a general principle of law that, while Congress may confer jurisdiction in certain types of suits on the United States Court, unless exclusive jurisdiction be either *express or implied,* the State courts have concurrent jurisdiction.

Claflin v. Housman, 93 U.S. 130;
Galveston etc. Ry. v. Wallace, 223 U.S. 481, 490;
Healy v. Ratta, 292 U.S. 263, 271;
Western Fruit Growers v. U. S., 124 Fed. (2d) 381, 387.

It is respectfully submitted that in the Statute under consideration, Congress granted exclusive jurisdiction to the United States Court by implication.

In the first place, the veteran is granted legal representation, free of charge, by the United States district attorney. It is open to serious question that Congress intended to impose the arduous task upon these officials of appearing, on behalf of the veteran, in the numerous State courts usually to be found within the limits of one federal judicial district. To do so would demand extensive traveling, with consequent cost to the government, on the part of the officials and could result, if litigation under the statute became extensive, to a serious personnel problem to the Department of Justice.

More persuasive is the fact that the Statute directs the court to grant a speedy hearing, in such cases and to advance them on the calendar. As Judge Stephens aptly says in his opinion in the Court of

Appeals* "Here, surely, the Congress was thinking of federal courts for it could hardly assume to command the states * * * in and handling of calendars in their courts."

Of equal importance is the specific direction in the Statute that no fees or court costs shall be taxed against the veteran. It is obvious that Congress has no power to command the states to waive fees and costs and to open their courts, free of charge, to persons who have a right to be in court solely because of a right granted to them under a federal statute.

It is also significant that Congress specifically directed that costs be waived; it did not provide that the government should pay the costs or reimburse the veteran, as would have been necessary to carry out the beneficent effects of the Statute, if the cases were to be prosecuted in the state courts.

The Congress, in enacting this Statute, did so as part of a general scheme to provide for the national defense. The speedy and inexpensive restoration to civilian life of the returning veteran was an essential part of this scheme, both for the benefit of the veteran and the government as a whole. Therefore, Congress did not merely grant a general right of action to the veteran, which would be subject to the costs and possible delays which might be encountered in the courts of the several states, but granted a *speedy* and *inexpensive* means of enforcing that right. In this

*Appendix A.

type of legislation it might be said that the speed and the inexpensiveness ofthe remedy are as important as the remedy itself. In order to do so it provided for free legal services by the government, for priority on the calendars of the courts and for waiver of the usual fees and costs. As the Congress obviously could not impose these restrictions upon the state courts we must assume that it intended to utilize a forum over which it had control, that is, the federal courts.

We must also assume that the Congress had a specific purpose in mind in enacting these provisions, that is, the speedy rehabilitation of the veteran with as little confusion to the national economy as possible. Assuming this, we must also assume that Congress intended that these provisions be enforced, otherwise their enactment was meaningless and could not effectuate and put into action the general plan which it had in mind. To enact these provisions and then put their enforcement completely beyond its control by not impliedly reserving jurisdiction in the federal courts, would be an idle act.

This Honorable Court, in *Market Co. v. Hoffman,* 101 U.S. 112, 115, asserted that a court is not at liberty to construe any statute so as to deny effect to any of its language; and that it is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word.

We respectfully submit that to construe the Act in question so as to give concurrent jurisdiction to the state and federal courts would deny "effect" and

"significance" to all of these specific directives in the Statute for the benefit of the veteran.

2. The arguments advanced by the Court of Appeals in support of its decision that Congress did not confer exclusive jurisdiction upon the United States courts are not persuasive.

As quoted in the opinion of that court, this Honorable Court said, in *Fishgold v. Sullivan Dry Dock Co.*, 328 U.S. 275, at page 285:

> "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need * * * Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permit."

The Appellate Court argues that a liberal construction of the Act would permit concurrent or coordinate jurisdiction in the State courts in order that a veteran residing in an outlying portion of the state might choose to sue in his neighboring state court rather than in the United States District Court.

This argument which, in effect, makes the test of the intention of Congress in conferring exclusive or concurrent jurisdiction, dependent upon the convenience of the plaintiff and the availability of a United States Court, is open to serious objection.

In the first place, in the instant case, it assumes a situation which did not exist. Kan, the petitioner herein, was a resident of San Francisco, where both

a District Court and a Court of Appeals are located. (R. 77.)

Second, in the instant case the petitioner did not choose to sue in the state Court and to waive all of the benefits of the Act. He was forced into the state Court by his employer, who, knowing that the petitioner was making a claim to the benefits under the Act, brought an action in declaratory relief to determine the extent of those rights with the obvious purpose of forcing him to lose the benefits which the Act provided. (R. 40-41.) Respondent's counsel in open Court, made the following statement, "Mr. Kan was not taking any initiative to bring this matter into court." (R. 41.)

As stated by Judge Stephens in his opinion:

"It is not clear to me, however, that the way is always open to the service man to select his forum if both state and federal courts have jurisdiction of his case. May the employer not do as he did in the instant case and draw the returning employee into the state court, 'willy-nilly' by fast action in filing a declaratory action? If so, the congressional intent to grant special advantages to those who fought for the government may be defeated."*

It can scarcely be held to be a liberal construction "for the benefit of those who left private life to serve their country in its hour of great need" to so construe the Act, upon the basis of the convenience of the veteran and his access to a Court, so as to open the door

*Appendix A.

to a subterfuge such as used in the instant case which effectively strips the veteran of all the benefits which Congress tried to grant him.

In the third place, putting the test of jurisdiction upon the basis of convenience of access to a United States Court is not an effective test. It can be applied to all federal statutes, in which jurisdiction in United States Court is not exclusive, and appears to be as more effective criticism of the federal judicial system than it does a test of jurisdiction.

3. It is equally apparent that the mere fact that other state Courts might have assumed jurisdiction of similar actions cannot serve to confer jurisdiction upon them if Congress intended to make jurisdiction exclusive with the federal Courts.

In any event, the cases cited by the Court of Appeals in support of the contrary proposition are not in point.

(1) Subsection (e), which gives the District Court of the United States power to enforce the provisions of subsections (b) and (c) is limited to a *private employer.* (Appendix C.)

Newman v. McCullough, 212 S.C. 17, 46 S.E. (2d) 252 and *Hanebuth v. Patton,* 115 Colo. 166, 170 P. (2d) 526 are cases which involve *municipal employees,* who are expressly excluded from the provisions of subsection (e).

(2) Subsection (e) empowers the District Court of the United States to force the private *employer* of a *veteran* to reinstate him and to grant him seniority.

Murphy v. Chrysler Corp., 306 Mich. 610, 11 N.W. (2d) 261, involved a claim for insurance under a group insurance plan brought by the beneficiary of a person who quit his employment before induction into the armed services and who died before induction. It is apparent in this case that the man was neither an employee nor a veteran. (The act is limited to persons inducted into the armed services. 50 U.S.C. App. 308, Subsection (a).)

In re Walker's Estate, 185 Misc. 1046, 53 N.Y.S. (2d) 106 involved the construction of a clause in a will making certain bequests to "employees". The claimant, a doctor, argued that he was an employee and that he had gone into the armed services and was entitled to the benefits of the Act. The Court, interpreting the will, held that he was not an employee under its terms, but that a professional relationship existed. This was not a case brought by a veteran under the Act and the Court did not interpret the Act in arriving at its conclusion.

We also respectfully submit that the second circuit, in *Feore v. North Shore Bus Co.*, 161 F. (2d) 552, cited by the Appellate Court herein, applied a liberal construction to the Act for the purpose of enlarging their jurisdiction while in the instant case the Court of Appeals applied a "liberal" construction for the purpose of curtailing it.

4. The Court of Appeals seems to consider it to be important that the veteran did not seek a dismissal of the state Court action "upon the grounds that the

G. I. Bill of Rights gave him a right to choose his own forum".*

We respectfully submit that if the state and federal Courts have concurrent jurisdiction, as the Court of Appeals holds, the petitioner would have no grounds upon which to seek a dismissal.

The petitioner does not believe that *Ames v. Kansas,* 111 U.S. 449, cited by the Court of Appeals is in point. The right given to a foreign diplomat under the Constitution is a *personal* right which he carries with him; he *may* sue in any Court having jurisdiction of the parties and the subject matter of his action but *he may refuse to be sued in any Court* but the Supreme Court.

No such personal right attaches to a veteran, as such. Therefore, if the state and federal Courts have concurrent jurisdiction under the Act, the petitioner herein could not seek dismissal of the state action or even removal to the federal Court unless there was diversity of citizenship (which did not apply in this case). The ground for removal that the suit arose under the laws of the United States was not open to him as the test of this ground is that the federal question must appear from the original complaint.

Tennessee v. Union & Planters Bank, 152 U.S. 454, 38 L. Ed. 510;

Bell & Hood, 327 U.S. 678, 90 L. Ed. 939;

Ex parte Poresky, 290 U.S. 30, 54 S. Ct. 3;

The Fair v. Kohler Die & S. Co., 228 U.S. 23, 57 L. Ed. 717.

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*Appendix A.

No such question arose from the complaint in the instant case. The first time any such question arose in the state action was by the petitioner's cross-complaint, which was a purely defensive maneuver on his part, to protect his rights after he had been drawn into the state Court by the actions of his employer.

II.

THE DECISION OF A STATE COURT INTERPRETING AN ACT OF CONGRESS IS NOT BINDING ON A UNITED STATES COURT.

The Superior Court of the State of California found that the petitioner was employed by the corporation at $500 per month and that the plaintiff (respondent Tsang) and the partnership offered to immediately restore the petitioner to the "same position which he had with the corporation." (Findings XII and XIV.)* Both the Superior Court and the District Court of Appeal held that this was compliance with the Act.

Several United States Courts have held directly contrary in construing the Act.

In *Parker v. Boyce,* 74 F. Supp. 581, the Court held that the veteran whose salary, prior to his entry into the service, as manager of an advertising business had been $300 a month, was entitled to reinstatement at $600 a month, which was the salary of the incumbent manager upon the veteran's return from military service.

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*Appendix D.

In *Salter v. Becker Roofing Co.*, 65 F. Supp. 633, the Court held that an offer of reinstatement at the salary the veteran received when he entered the service, when the man who replaced him had received an increase, was not a compliance with the Act.

To the same effect:

Covey v. Douglas Aircraft Co. (S.D. Cal., as yet unreported);

Troy v. Mohawk Shop, Inc., 67 F. Supp. 721;

Tannenbaum v. Ballentine Sons, 161 F. (2d) 1023, affirming a not yet reported decision of the District Court of New Jersey;

Mihelich v. Woolworth Co., 69 F. Supp. 497.

It is respectfully submitted that the decision of a state Court interpreting an Act of Congress is not binding on the United States Courts.

Western Pacific Ry. Co. v. United States, 313 U.S. 450;

Amis v. Smith, 41 U.S. 303, 10 L. Ed. 973;

Hart v. Com'r of Int. Rev., 54 F. (2d) 848;

Larson v. State of South Dakota, 278 U.S. 429;

Pinchot v. Com'r of Int. Rev., 113 F. (2d) 718.

Dated, San Francisco, California,
May 6, 1949.

Respectfully submitted,
GILBERT S. WOOLWORTH,
Attorney for Petitioner.

JAMES T. DAVIS,
Of Counsel.

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CHARLES ELMORE CROPLEY
CLERK

No. 778

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 11,891

JOHN JOSEPH KAN,
Petitioner,

vs.

ERNEST TSANG,
Respondent.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 11,891

JOHN JOSEPH KAN, *Petitioner,*

vs.

ERNEST TSANG, *Respondent.*

Respondent's Brief in Opposition to Petition for a Writ of Certiorari

THE PETITION IS NOT MERITORIOUS

1. The State Courts Have Jurisdiction Unless Affirmatively Ousted by Statute; if Congress Intended the Federal Courts to Have Exclusive Jurisdiction It Would Have Said So; Having Not Done So, the Several Courts Have Concurrent Jurisdiction.

The present question is whether the federal courts have exclusive jurisdiction, and the state courts have none, in the determination of *damages* claimed by a former member of the military services because of his ex-employer's fail-

ure to reemploy him as provided by the so-called "G. I. Bill of Rights." It is one that should be answerable by use of ordinary common sense without resort to extended legal analysis.

If Congress had intended to provide the jurisdiction to be exclusive, it easily could have said so. The very fact that it did not say so is the best proof that it did not intend the jurisdiction to be exclusive.

The statute goes no further than to say that the federal courts shall have jurisdiction, a proper stipulation because otherwise in the absence of diversity of citizenship, requisite minimum amount in controversy, etc., the federal courts might not have jurisdiction.

Of course, it is conceded a state court has general jurisdiction of actions for damages between citizens of said state. On the face of the statute, there is nothing *directly* withdrawing jurisdiction of causes arising under it from the state courts and nothing *inferentially* doing so.

The courts should proceed upon the basis that Congress has enough intelligence to say so, if it wants to provide for such exclusive jurisdiction; the courts should not try to fill in the unspoken words with vague speculations.

2. The Department of Justice Recognizes the Lack of Merit to This Petition.

This action in the District Court was filed for the ex-service man by the United States Attorney for the Northern District of California, conformable to the statute providing that the latter official shall act *gratis* in such cases. This representation extended to appearing for the present petitioner when he was appellee in the Court of Appeals for the Ninth District.

Our information is that after that court reversed the judgment, upon application of the United States Attorney to the Department of Justice for leave to pursue the matter to this court, the Attorney General of the United States recognized the correctness of the decision of the Court of Appeals and instructed the United States Attorney to proceed no further. This is rather evident from the fact that the petitioner, for the first time since the action was filed, is now appearing through private counsel.

3. The Attorneys Who Appeared for the Petitioner in the District Court Recognized That This Petition Has No Merit.

According to the Transcript of Record, particularly the Reporter's Transcript contained therein, on May 27, 1946, there was a pretrial of the employer's special defenses of res judicata and another action pending (T. of R. 36). We then showed to the District Court that the ex-service man had voluntarily selected the Superior Court of the State of California as his forum to claim damages from the employer on the ground that he had been refused reemployment; that regardless of the question of whether the state court's judgment was conclusive upon the federal court, its findings of fact were; that taking the facts as adjudicated by the state court, the federal court could not rationally grant any relief. Those facts included such findings as that the ex-employee had been offered the return of his same job, at the same rate of pay, same seniority, etc., and that he had refused to return to work (T. of R. 36-45).

Thereupon, the Assistant United States Attorney (Mr. Scholz) made his showing and in doing so called for a

statement by the attorney (Mr. Ames) who had appeared for the ex-employee in the state court action. They agreed that the state court's adjudication that the employee had sustained no damages would be res judicata against the federal court entertaining any claim of *damages*, but claimed a distinction in that the present action, to the contrary, was one for equitable relief in restoration of the man's job; that the federal court alone had jurisdiction of the latter phase (T. of R. 45-52).

The District Judge *abated* this action until the Supreme Court of the State of California could pass upon the appeal which the ex-employee had taken from the Superior Court judgment (T. of R. 52). Its order ultimately was filed, affirming the Superior Court. Meanwhile the employer-partnership terminated by expiry of the three-year period for which it was organized, so when the District Judge ordered that we proceed with the trial (without ever ruling on the issues of the pretrial), petitioner acknowledged that he was now asking for damages alone, without restitution of his job (T. of R. 72-76).

The fact remains, therefore, that this case went to trial upon a claim that petitioner's own attorneys already had agreed was barred by the previous state court action.

STATEMENT OF THE CASE

To the petition's statement, we add:

1. It Is Not Necessary to Determine That the State Court Had Concurrent Jurisdiction to Determine the Legal Rights of an Ex-Service Man.

Both the state court action and this one were prosecuted for the identical relief, i.e., damages, and none other. The opinion of the District Court of Appeal, contained in the appendix, relates:

> "In the present case Kan does not seek reinstatement, but seeks damages from Tsang." (Appendix, p. 6)

It has been our position throughout this case, beginning with the pretrial referred to above, through to the briefs filed in the United States Court of Appeals, that it was not necessary to go so far as to determine that the state court's conclusions of law were binding on the federal court in respect to this, an action on a federal statute; that the state court having jurisdiction of the persons of its two citizens, competently determined certain facts; that those facts alone were inconsistent with and barred any relief sought by the petitioner, particularly damages. In other words, it having been finally adjudicated between these same parties that the employer had offered to return the employee to the same job, at the same place and at the same rate of pay, and also that the employee had refused to accept the same, could not be the predicate for any litigation anywhere of a claim by the employee that he had sustained damages by reason of the employer having refused him his job.

2. Respondent's Defenses Were More Extensive Than Stated in the Petition for Certiorari.

Not so perfunctory as stated in the petition, our defenses went much further. First and foremost, we have always contended that in truth and in fact the petitioner had no cause upon the merits. Regardless of the state courts having held the same thing, in reality we demonstrated again in this case that by his own testimony the employee admitted that he had been offered a return to the same job at the same rate of pay; that he insisted upon a raise in pay because of extraneous circumstances; also he took the position he would not return unless given a written contract for a three-year term, despite the fact that before his enlistment he was employed only on a month to month basis.

We also showed that the uncontraverted record disclosed that he had been the moving party for the judicial dissolution of the employer-partnership in another action in the state court; that therein the court had fixed a deadline for the filing of claims against the partnership; that this petitioner did file certain claims therein but none for this cause of action; that the partnership assets had been distributed and that it would be unconscionable for him to pursue his claim of damages against this respondent, who was the general partner, but from whom the assets had been taken in the dissolution proceedings.

We also reestablished (as indeed, the state court found) that the petitioner was not a fit and proper person to be reemployed; that he was insubordinate and even he did not deny that following his discharge from the army, he brought a gun into the place of business and threatened to shoot the respondent.

PETITIONER'S ASSIGNMENT OF REASONS FOR GRANTING WRIT

In his petition (page 6), petitioner assigns two reasons why this court should grant the writ, viz.:

1. Alleged Conflict of Decision Between Circuits.

In this connection, petitioner refers to but one other case, the decision of the Sixth Circuit in *Trailmobile v. Whirls,* 154 Fed.2d 866. Even a cursory reading of that opinion discloses that it does not hold as contended for by petitioner and is not in any wise in conflict with the opinion filed in this case. What it did hold was that Whirls was not bound by a previous class suit filed by one Hess. (To the contrary, the present case involves two actions between the identical persons.) The *Trailmobile* case is so patently inapplicable that despite the fact that it was assertedly *followed* by the District Court (petition, page 5), it was not considered worthy of mention in either of the two opinions filed by the Court of Appeals!

2. That the State Court Erroneously Interpreted the Petitioner's Rights.

We have attached a copy of the opinion of the state appellate court to demonstrate the utter incorrectness of petitioner's assertion. Kan and Tsang were receiving $500 per month each as co-managers before the war. When Kan left, Tsang was raised to $750 because he was doing the work of two. When Kan returned he was offered $500, but wanted $750 because that was what Tsang had been receiving meanwhile. Kan did not claim he was entitled to it except he had an unofficial understanding that *in perpetuum* he always was to get the same amount as Tsang. The state

court held there was no such understanding. It also held that Kan had refused the proffered reemployment until he could exact a three-year, written contract and that there was no basis for the employer being required to give him such, he not having had any contract at all before he enlisted.

Be that as it may, it was not any "interpretation" of petitioner's *rights* under the federal statute that was binding on the federal court. The Court of Appeals, this petition to the contrary, never did so hold. The state court tried the same issues of facts and found that the job was offered, that petitioner refused the same, that he had no contract with any escalator clause providing he should receive any particular raises along with Tsang, that he sustained no damages. Those findings of *fact* are res judicata against any other court ever holding to the contrary.

Without finding the facts to be contrary to what they were found to be by the state court, no court could sensibly allow any damages to this petitioner.

CONCLUSION

In summary it is our position:

1. The opinion of the United States Court of Appeals is correct in holding that the federal court does not have exclusive jurisdiction, to the exclusion of the state courts, to determine a claim of damages arising out of an alleged failure to restore an ex-service man to his former position;

2. It is not necessary to the present case to determine whether that holding is correct, inasmuch as it is con-

ceded that the state court did have the right to make a determination of the facts which it did adjudicate, and those facts are binding upon the federal court; that the facts so found preclude the granting of any relief to this petitioner;

3. From his own testimony and evidence, petitioner never had a cause of action with any merits and is entitled to no relief whatsoever.

Dated: San Francisco, June 6, 1949.

ROBERT E. HATCH
Attorney for Respondent

LEMUEL H. MATTHEWS
Of Counsel
for Respondent

(Appendix follows)

APPENDIX A

In the District Court of Appeal
State of California
First Appellate District

DIVISION ONE

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1 Civil No. 13,241

Ernest Tsang,
Plaintiff and Respondent,
vs.
John Kan,
Defendant and Appellant.

OPINION

This is an appeal by defendant and cross-complainant, John Kan, from a judgment and decree in an action for declaratory relief in which the trial court adjudicated that he is a limited partner in a certain restaurant business to the extent of 1,000/9,700 and has no right to be employed by the corporation originally operating said business; its successor, a partnership, or the plaintiff, Ernest Tsang, the general partner and manager of the partnership. For convenience, the plaintiff and cross-defendant will be referred to as Tsang, and the defendant and cross-complainant as Kan.

On September 28, 1939, a restaurant business was incorporated under the laws of the State of California

as the Cathay House, Inc. Kan and one Dr. Lee are the originators of the enterprise. Stock in the corporation was sold to a number of Chinese, including Tsang, who ultimately paid in about $5,500 of the $9,700 paid in capital. George Chew was the next largest stockholder, having paid $1,500. Kan and his wife together contributed only $1,100. Tsang became president of the corporation and Kan was made secretary. They received salaries of $300 a month, which were increased to $500 a month. In 1941, Kan ceased to be secretary of the corporation and continued as a director. On July 23, 1943, he enlisted in the armed forces of the United States and left San Francisco immediately. October 1, 1943, a limited partnership was created with Tsang as general partner and the other stockholders, including Kan and his wife, as limited partners—it being arranged that the partnership percentages as established in the articles of copartnership were the same as the percentages of ownership of stock in the corporation. Kan's wife signed her husband's name to the certificate of limited partnership upon the advice of Kan's attorney. Tsang secured a written contract of employment from the partnership for $750 a month commencing October 1, 1943, for the duration of the agreement of limited partnership. The minutes of the corporation reveal that the corporation assets were transferred to the limited partnership. The corporation was not dissolved. Kan was honorably discharged November 26, 1943.

October 21, 1944, Tsang filed a complaint for declaratory relief alleging that Kan made claims that Tsang individually and/or as president and general manager of the corporation and/or as general partner was obligated to employ Kan at Cathay House, and praying for a judg-

ment and decree declaring and determining the rights and duties of the parties. Kan's answer admitted that there was a controversy between the parties and referred to his cross-complaint for the particulars of his claims. The first cause of action pleaded in the cross-complaint alleged that before Kan enlisted, Tsang agreed that upon Kan's return Kan should be restored to the position of comanager of Cathay House on an equal basis with Tsang, and that since Tsang's salary was increased to $750 a month, he was entitled to be employed at $750 a month by virtue of the Selective Training and Service Act of 1940, as amended (50 U.S.C.A. App. §§301 et seq.), but that Tsang refused to employ him either at $750 or $500 a month; he alleged that he suffered damages in the sum of $750 per month for twelve months to the date of the filing of the cross-complaint or a total of $9,000, less what he has been able to earn, namely, $1,130, or an actual damage of $7,870.

The second cause of action pleaded in the cross-complaint alleged that Tsang deliberately promised to take Kan back after his return from military service, without any intention of performing such promise; that Tsang caused the corporation's business to be transferred to a limited partnership with himself as sole general partner, knowing that a limited partner could not be employed in the partnership without changing the relationship of the partners, which Tsang had no intention of permitting; that Tsang compelled Kan's wife, by duress and threats of injury to the interests of her husband, to sign her husband's name to a certificate of limited partnership, and that Kan suffered general damages in the sum of $25,000 by reason of Tsang's fraud in depriving Kan of his employment.

The trial court found that when Kan went into the Army he was getting $500 a month with no agreement, oral or written, for the continuation of his employment or for receiving a different rate of compensation in the future, and that within three months of his return he was offered the same position on the same basis, but he refused to accept the same and never offered nor was willing to return to said position. The trial court evidently believed Tsang's testimony, a portion of which follows: "Q. * * * did Mr. Kan discuss with you the possibility or desirability of his returning to the Cathay House? A. He did. Q. And did you tell him one way or the other whether he would be acceptable as an employee? A. I did, on numerous occasions. Q. And what did you tell him in that regard? A. I told him that the position that he occupied formerly, at the same rate of salary, was open to him. * * * As I recall it was the first day of Mr. Kan's return to San Francisco after his discharge. I was very surprised to see him that day. He came into the Cathay House—I had no knowledge that he was coming in or was on furlough, or discharged. He came in to me, and he said, 'How about a job.' I said, 'O. K. Come back to work.' He said he first would like a vacation of about two weeks, to which I agreed. On or about December 15th, 1943, Mr. Kan and I had lunch * * * where he and I discussed—no one else was present—his return to the Cathay House. I informed him his position was open at $500 a month. He stated that he wanted $750 a month. I informed him that I had no power to give him $750 a month, and that my salary at that rate was set by the stockholders; but I felt I could offer him his $500 a month and I informed him if he insisted upon

$750 a month I would have to consult the other stockholders, or one of the majority stockholders of the firm, which was Mr. George Chew. So we agreed to talk it over later, pending any conversation we might have had with Mr. George Chew concerning the matter. Mr. Kan came back to see me several days later and asked me if I had seen Mr. Chew, and I had not, because Mr. Chew was out of town. So I asked Mr. Kan, why don't you go down and see Mr. Chew. He might be back. He went down to see Mr. Chew, and came back about three-quarters of an hour later and asked me what this was all about, was I trying to give him a run-around, or what. I said, what did Mr. Chew say? And Mr. Kan informed me Mr. Chew did not agree to give him $750 a month, but was agreeable to him coming back to work at his former salary."

That Kan refused to return to his "same position on the same basis," is further seen in the testimony of Tsang's attorney to the effect that Kan refused to return to the Cathay House without a written contract covering several years' employment, although he had never had such a contract before he left to serve in the Army.

If the parties had entered into a contract under the terms of which Tsang was bound to take Kan back as comanager after Kan returned from the Army, Kan would be entitled to enforce such contract. Since the trial court found that Tsang offered to take Kan back, Tsang cannot be held to have breached any such contract. The question then arises, do the provisions of the Selective Training and Service Act of 1940 aid Kan?

Kan presents certain citations to the effect that the Selective Training and Service Act is to be construed liberally; that every consideration should be given to a

serviceman; that employees often include those in superior positions. It is not necessary to lengthen this opinion by commenting upon each of the cited cases. The reemployment provisions of the act, which are relied upon by Kan, are designed to enable a serviceman to be restored to the position he held before entering the armed forces. In the present case Kan does not seek reinstatement, but seeks damages from Tsang.

Kan contends that Tsang's terms that Kan sign a release, sign over his stock in Cathay House to his wife, and come back as an employee, violated the Selective Training and Service Act. The trial court's finding that Tsang offered to restore Kan to his same position indicates that the trial court considered that these "terms" did not alter the position which Kan had held before his enlistment. As to the matter of a release, Tsang's attorney testified that at a meeting held in his office shortly before this action was commenced he said "I thought it would be well for us to have some sort of a document—let's call it a mutual release, where John (Kan) agrees that he starts from scratch. * * * I have had experience in somewhat similar matters in the past, where after the lapse of time that people begin to imagine they have rights which they never thought they did before, so I said, 'Mr. Kan, have you any claims against Mr. Tsang of any kind —do you claim that you have got any right, any contract, or are there any agreements that have not been mentioned;' and he said absolutely none. I asked the same question of Mr. Tsang, and he gave the same answer." Such being the situation, the "release" had nothing to do with the Selective Training and Service Act or any rights

Kan might have had thereunder. Tsang's request that Kan sign over his stock to his wife was evidently the result of *his* conception of the law of limited partnerships —that a limited partner could not manage. The last requirement was explained to Kan by Tsang's attorney as follows: "* * * you understand that if you are taken back that you will be an employee * * * and if your services are not satisfactory * * * the employer has the right to terminate your employment." The trial court found that during the time that Kan was an officer and employee of Cathay House, Inc., his terms of office and employment were at the pleasure of the board of directors.

The trial court's finding that "Within three months following [date of discharge] plaintiff [Tsang] and said partnership offered to immediately restore defendant [Kan] to the same position which he had with the corporation * * * but defendant refused to accept the same," being supportted by evidence, justifies an affirmance of the judgment against Kan on the first count of his cross-complaint.

The trial court found against Kan on the second count of his cross-complaint. Specific findings were made that Kan had consented to the formation of the partnership and that it was not true that Tsang had no intention of permitting Kan to participate in the partnership. These findings are not challenged.

Kan urges that the evidence supported the allegation that Tsang promised to take Kan back after his return from militaryy service without any intention of performing such promisee, and hence that recovery should have been granted on the second count. Kan relies upon Civil Code,

section 1572, subdivision 4, which describes fraud as "A promise made without any intention of performing it," within the meaning of the chapter in which that section appears. Said chapter relates to the freedom of consent of the parties to a contract. (*Harlow v. American Equitable Assur. Co.*, 87 Cal. App. 28, 32 [261 P. 499].) Such fraud may be the basis of defense to a suit on an executory contract and it may also be the basis of an action for rescission of a contract. (*Wilson v. Rigali & Veselich*, 138 Cal. App. 760, 765 [33 P.2d 455].)

In the present action Kan seeks to recover damages for what is described in the Civil Code as "fraudulent deceit." The controlling sections are section 1709, which provides that "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers," and section 1710, which provides that a deceit within the meaning of the foregoing section is "4. A promise, made without any intention of performing it." The element of damage must be established to recover under these provisions. (*Munson v. Fishburn*, 183 Cal. 206, 220 [190 P. 808]; *Gerini v. Pacific Employers Ins. Co.*, 27 Cal. App. 2d 52 [80 P.2d 499].) In the language of *Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 571 [126 P. 351, 42 L.R.A.N.S. 125], "It is fundamental, of course, that no matter what the nature of the fraud or deceit, unless detriment has been occasioned thereby, plaintiff has no cause of action." Assuming that at the time of Kan's enlistment Tsang promised to take Kan back without intending to do so, it is difficult to see that Kan was damaged thereby. It nowhere appears that Kan joined the Army because of

any such promise. Kan had made up his mind to enlist before he ever spoke to Tsang about it.

The allegation that Tsang compelled Kan's wife, by duress and threats of injury to the interests of her husband, to sign her husband's name to a certificate of limited partnership, is totally unsupported by the evidence. On the contrary, the evidence establishes that she acted upon the advice of Kan's attorney.

The judgment and decree is affirmed.

WARD, J.

Peters, P. J., and Bray, J., concurred.

Filed February 27, 1947.

Walter S. Chisholm, Clerk.

Appellant's petition for a hearing by the Supreme Court was denied April 28, 1947.

(Reported 78 Cal. App. 2d 275, 177 Pac. 2d 630.)